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Ontario Labour Relations Board HIGHLIGHTS

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SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in December of last year. These decisions will appear in the November/December issue of the OLRB Reports. The full text of recent OLRB decisions is now available on-line through the Canadian Legal Information Institute www.canlii.org.

Health and Safety – Mining – Glencore appealed two orders issued by a Ministry of Labour inspector under s. 61 of the OHSA in regards to its mining operation – The Orders prohibited Glencore from "skipping" (bringing mined ore or unusable rock to surface) while shaft inspections were being conducted at the Mine – The Board noted the Act requires a balance between risk of harm and ability to carry out a business enterprise and that while the Act is heavily slanted in favour of eliminating risk, that objective was not absolute – That is, the standard is not perfection or the complete absence of risk, but rather a standard of ensuring all reasonable precautions in the circumstances – The Director under OHSA argued that a hazard may result by something falling in the shaft and striking a member of the shaft inspection crew, and that this is foreseeable and preventable – After reviewing all the circumstances (and noting that industry practice, while a relevant factor, is not necessarily the definitive standard) the Board concluded that skipping while inspecting did not create a reasonable risk of harm in the circumstances that exist at that specific Mine, given other precautions that are in place, and therefore the OHSA and its Mining Regulations did not prohibit skipping during inspections – Appeals allowed and Orders rescinded

GLENCORE CANADA CORPORATION; RE: SUDBURY MINE, MILL & SMELTER WORKERS' UNION, LOCAL 598; RE: A DIRECTOR UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT; OLRB File No. 3927-11-HS & 2562-12-HS; Dated December 15, 2015; Panel: Jesse M. Nyman (79 pages)

Certification – Construction Industry – Membership Evidence – On a preliminary issue the employer argued the membership card submitted by an employee who was under eighteen years of age was void *ab initio* – The Board begins by stating its statutory task in the certification application is to determine whether the union has the necessary membership support in the bargaining unit (individuals who are members of the union or have applied for membership) and not one of determining the contractual relationship between the union and its members – The Board notes that it is indisputable that persons under the age of 18 can be employees within the meaning of the Act and that it would be entirely inconsistent with the purposes of the Act to suggest that a minor can agree with his or her employer to become an employee, become subject to all the provisions of the Act that govern the representation of such employees, but have no ability to participate in the free selection of that representation – Furthermore, finding that minors could not join a union would mean they become a part of the bargaining unit, as employees, but could not exercise a fundamental freedom of choice as reflected in the certification provisions –

In summary, the Board found that the labour relations context and the statutory scheme (where membership evidence serves as an expression of the representative wishes of the card-signer for the purposes of participating in the Board's certification process, which may fundamentally alter the employee/employer relationship) dictates that the cards signed by minor employees cannot be void *ab initio* – Matter continues

LANCA CONTRACTING LIMITED; RE: CARPENTERS' DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; OLRB Board No. 1270-15-R; Dated December 16, 2015, Panel: Eli A. Gedalof (9 pages)

***Agricultural Employees Protection Act, 2002* – Certification – Employees** – The main issue before the Board was whether the employees who work at MedReleaf, a company operating under a license from Health Canada to grow cannabis or marijuana for human consumption, are exempt from the *Labour Relations Act, 1995*, because they are involved in agriculture – MedReleaf's business takes place in a building of 55,000 square feet, with approximately 69 employees – The ground floor is where the cannabis is bred, grown, cultivated and packaged – The Board's analysis began by noting that its jurisprudence has made it clear that the interpretation of agriculture did not in any way exclude purpose-built indoor facilities that more resemble a factory than anyone's picturesque view of a farm (see: *Wellington Mushroom Farm, Cuddy Chicks, Spruceleigh Farms, Niagara Poultry Services*, and *Spawnline Inc.*) – After noting the definition of "agriculture" is inclusive, the Board notes that although the production, distribution and use of the medical marijuana is highly regulated, this does not change the fact that cannabis is a plant that is grown and that MedReleaf grows, harvests and sells these plants – The Board saw no real difference between tobacco (specifically mentioned in the definition of "agriculture" in the AEPA), which is also regulated, and cannabis – Finally, the Board disagreed with the union that the statute should be interpreted using Charter values – This was not a situation where excluding employees from the LRA would mean they had no protection; rather they are protected by the AEPA, a statute found not to be at odds with the Charter by the SCC – The Board held that where the ordinary rules of interpretation lead it to conclude that employees engaged in the growing, cultivating and harvesting of cannabis fall within the definition of agriculture and are therefore covered by the AEPA, that ends the matter – Applications dismissed.

MEDRELEAF CORP.; RE: UNITED FOOD AND COMMERCIAL WORKERS CANADA; OLRB file No. 0489-15-R, 1070-15-U & 1184-15-U; Dated December 15, 2015; Panel: Bernard Fishbein (21 pages)

Certification – Construction Industry – Employer – The dispute was whether Labour Ready or Newton Group (a contractor) was the employer of two employees – The employees were recruited by Labour Ready and received some (unpaid) training during orientation – Labour Ready dispatched them, paid the employees an hourly rate determined by Labour Ready, were responsible for making and remitting statutory deductions and paid the employer's share of EI, CPP and Workers' Compensation premiums – On the other hand Newton Group directed them to perform the work and provided the tools; told them what to do and how to do it; were the source of the work they performed; determined if their work was acceptable and for how long they could continue to work on the project – The Board found a significant element of any relationship is providing some form of compensation to employees while they are at work and that the individuals dispatched by Labour Ready were not paid after they were "hired," (nor even while they are waiting to be dispatched), but only after they had been referred for employment by Newton Group – Providing personnel and payroll services to the entity that is the source of employment does not result in the personnel and payroll service provider becoming the employer of the employees it has provided – Matter continues

NEWTON GROUP LTD.; RE: CANADIAN CONSTRUCTION WORKERS UNION; RE: NEWTON SOLAR; RE: KIWI CONDO; RE: KIWI-NEWTON CONSTRUCTION LTD.; RE: KIWI CONSTRUCTORS LTD.; RE: NEWTON BRIDGE SOLUTIONS LTD.; RE: NEWTON PARKING STRUCTURES LTD.; RE: NADECO HOLDINGS LTD.; RE: KAIPIKARI HOLDINGS LTD.; OLRB File No. 2132-14-R; Dated December 16, 2015; Panel: Harry Freedman (16 pages)

The decisions listed in this bulletin will be included in the publication Ontario Labour Relations Board Reports. Copies of advance drafts of the OLRB Reports are available for reference at the Ontario Workplace Tribunals Library, 7th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
Qingrong Qiu Divisional Court No. 669/15	2714-13-ES	Pending
Airside Security Access Inc. Divisional Court No. 670/15	1496-15-ES	Pending
Cotton Inc. Divisional Court No. 554/15	3254-13-U 3255-13-R	Pending
Kognitive Marketing Inc. Divisional Court No. 51/15 **(London)**	0621-14-ES	Pending
W.H.D. Acoustics Inc. Divisional Court No. 52/15 **(London)**	3151-14-G 3716-14-R	Pending
IBEW Electrical Power Council of Ontario ***(Crossby Dewar Inc.)*** Divisional Court No. 501/15	1697-11-G 1698-11-G	Pending
Labourers' International Union of North America, Local 1059 ***(McKay-Cocker)*** Divisional Court No. 384/15	0883-14-R	Pending
Universal Workers Union, Labourers' International Union of North America, Local 183 ***(Maystar)*** Divisional Court No. 368-15	1938-12-R	Pending
LBM Construction Specialties Inc. Divisional Court No. 353/15	0121-14-R	January 20, 2016
EMT Contractor Division Inc Divisional Court No. 32-15 **(London)**	3514-13-R	Pending
Carlene Bailey Divisional Court No. 173/15	0480-13-U	Pending
Valoggia Linguistique Divisional Court No. 15-2096 **(Ottawa)**	3205-13-ES	Pending
Toran Carpentry Inc. Divisional Court No. 49/15	0229-13-R	January 26, 2016
Royal Ottawa Hospital Divisional Court No. 14-62782 **(Ottawa)**	2461-14-IO	Pending
Dean Warren Divisional Court No. 345/14	2336-13-U	Application for Leave to Appeal
Donald A. Williams Divisional Court No. 327/14	1129-13-U	February 18, 2016
Godfred Kwaku Hiamey Divisional Court No. 345/13; 346/13	2906-10-U 3568-10-U	August 13, 2015 Dismissed, Seeking leave to CA

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